United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

74-1104

ORIGINAL

UNITED STATES COURT OF APPEALS

For The Second Circuit

SILVER CHRYSLER PLYMOUTH, INC.,

Plaintiff-Appellee,

- against -

CHRYSLER MOTORS CORPORATION and
CHRYSLER REALTY CORPORATION,

Defendants-Appellants.

On Appeal from the United States
District Court for the Eastern
District of New York

PETITION FOR REHEARING CONTAINING
A SUGGESTION THAT THE APPEAL BE
REHEARD EN BANC

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PETITION FOR REHEARING CONTAINING A SUGGESTION THAT THE APPEAL BE REHEARD EN BANC

Preliminary Statement

This petition, submitted on behalf of Chrysler Motors Corporation and Chrysler Realty Corporation (collectively referred to as "Chrysler"), seeks rehearing of this Court's decision (slip op. 3669) dated May 23, 1975 (per Moore, Adams and Mulligan C. JJ.), which affirmed Judge Weinstein's order denying Chrysler's motion to disqualify plaintiff's counsel.*

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* Judge Weinstein's opinion is reported at 370 F. Supp. 581 (E.D. N.Y. 1973). This Court, en banc, previously held Judge Weinstein's decision appealable. Silver Chrysler-Plymouth v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974); the appeal was argued on September 16, 1974.

Chrysler respectfully submits that the panel's opinion has so altered this Circuit's rules governing disqualification of attorneys that a rehearing en banc is warranted. The panel majority's opinion, inter alia, allows an attorney who had direct access to relevant client confidences to rebut what was once a conclusive presumption that he learned confidential information, and effectively compels the former client to prove that the attorney was given substantial responsibility or specify the confidences the attorney could now use.

FACTS

Dale A. Schreiber, Esq., now a member of Hammond & Schreiber, P.C., attorneys for plaintiff, was associated with a predecessor of Kelley Drye & Warren ("Kelley Drye") for almost 3 years. Kelley Drye is, and has been since before Mr. Schreiber began working for the firm, "Counsel" to Chrysler and represented it in matters embracing almost the entire spectrum of legal work, including relationships and lawsuits with dealers. During his association with the firm, Mr. Schreiber spent well over 1000 hours on Chrysler matters (122a).* As a member of the litigation department, he worked on Chrysler cases, including dealer suits, like the present case, and had

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* Page references are to the Joint Appendix.

many contacts with Chrysler personnel, including a Vice President for Legal Affairs (106a-107a) and worked with Kelley Drye attorneys also working on Chrysler dealer suits. Yet, he has now switched sides, has joined with a self-professed dealer advocate specializing in suits against automotive manufacturers, including Chrysler, and has instituted the present action against the client for whom he once worked.

Among the dealer cases on which Mr. Schreiber worked were several which involved alleged coercion and inequitable conduct by Chrysler towards its dealers (119a-121a). An anti-trust case on which Mr. Schreiber admittedly did extensive work (62a) also involved claims of dealers' alleged subservience to Chrysler (159a; 122a-123a; 453a). These issues are relevant to plaintiff's claims herein of coercion and subservience to Chrysler. (9a) Similarly, several cases on which Mr. Schreiber worked involved claimed breaches by Chrysler of contracts with dealers, including one case involving an alleged oral agreement regarding a dealer's relocation (293a). Plaintiff here is claiming that Chrysler breached an alleged oral agreement with respect to dealer's relocation (5a).

During the period of Mr. Schreiber's association, Kelley Drye's litigation department was involved in other

Chrysler dealer suits, also related to the instant suit (123a-125a). Mr. Schreiber would have normally discussed these cases with the Kelley Drye attorneys who worked on them, at litigation department luncheons, and during informal as well as social conversations (105a-106a; 108a-109a; 453a-455a). Clearly also he had access to and reason to review the files on these suits (109a-110a). Indeed, in the Kelley Drye litigation department the 9 associates were encouraged to discuss openly the details of their cases in order to seek and offer advice. Neither the Gurney nor Baum affidavits, on which the panel and plaintiff so heavily relied, denied that there were frequent, candid discussions of Chrysler matters among Kelley Drye associates, in whose interest it was to learn about other Chrysler cases in the office. While knowledge of client confidences was not withheld from junior associates, Mr. Schreiber, by the time he left the firm, had over three years of legal experience, and was necessarily given a significant amount of responsibility (104a).*

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* Messrs. Hammond and Schreiber began their association by commencing a derivative suit against Checker Motors Corp. on the basis of information about Chrysler and Checker obtained by Mr. Schreiber at Kelley Drye (111a-16a).

POINT I

PLAINTIFF'S COUNSEL SHOULD BE DISQUALIFIED BECAUSE OF MR. SCHREIBER'S INDISPUTABLE PRIOR ACCESS TO RELEVANT CHRYSLER CONFIDENCES

A. An Attorney Who Had Access To Relevant Client Confidences Has Not Heretofore Been Allowed To Avoid The Presumption Of Such Knowledge

Prior to the panel's opinion, this Court had fashioned clear principles which gave attorneys guidance as to the obligations owed former clients and inspired clients with the certainty that attorneys would not be permitted to capitalize on their confidences. Chrysler respectfully submits that these guidelines have been effectively overruled by the opinion in this case. Fairly read, the panel majority's opinion suggests that to disqualify an attorney, a former client must establish either: (1) that the lawyer was given substantial responsibility for a case which required his learning relevant client confidences, or (2) that specific client confidences were in fact disclosed to the attorney. Clearly, neither of these criteria is realistic, for both erroneously assume that attorneys in law firms will only come in contact with relevant confidences when they are given responsibility for particular cases. Attorneys in litigation departments of law firms like Kelley Drye are, unlike unconnected sole practitioners, continually exposed to

client confidences from a wide number of cases on which they might work with the associate in charge, or even on which they never formally work, through discussions of the experiences and problems of other attorneys in the firm. Indeed, rare is the lawyer who has not sought the thinking of colleagues in the office, at lunch or on the golf course.

Recognizing the frequency with which client confidences are appropriately discussed in law firms, this Court long ago formulated the rule that firm members, regardless of their participation in relevant litigation or knowledge of relevant confidences, would be presumed -- irrebuttably -- to have knowledge of such matters and accordingly would be disqualified from ever participating in any similar litigation against their former firm's clients. These principles are illustrated by the situation presented in Fisher Studios, Inc. v. Loew's Inc., 232 F.2d 199 (2d Cir. 1956), and Laskey Bros., Inc. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955). Briefly, one Isacson had been employed for a few years as an associate with a large firm which represented motion picture companies. He took part in a number of these clients' suits and, like Mr. Schreiber, "had complete access to the firm's files which contained an abundance of data and information, not only gathered by [the] law firm but also disclosed to and confided in it by the motion picture companies...." (Laskey, 224 F.2d at 829

(dissenting opinion)). After leaving the firm, he joined with one Malkan and then commenced a number of suits against the same companies. Because Isacson had had access to confidential information (Fisher Studios, 232 F.2d at 202) he was conclusively presumed to have knowledge of client confidences and he, as well as Malkan & Isacson, were disqualified. After leaving Isacson Malkan joined with one Ellner and commenced suits against the same companies. This Court ruled that, with respect to one suit with which Isacson had absolutely no contact, Malkan should be given the opportunity to rebut the presumption by demonstrating that he learned no confidential information at all from Isacson. (Laskey, 224 F.2d at 827).

Applying these principles to Silver Chrysler-Plymouth, it is clear that, because of his access to and occasion to learn client confidences, Mr. Schreiber like Isacson is not entitled to rebut the presumption that he acquired confidential information. Similarly, Hammond & Schreiber must be disqualified as was Malkan & Isacson. Instead, the panel majority's opinion has turned the "conclusive presumption" heretofore applicable to an Isacson or a Schreiber into a mere "inference" which "may arise" and, if so, may be rebutted. (slip. op. at 3674). In short, the opinion overturns the principle of imputed knowledge*

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* Whatever may be the validity of this Court's statement (slip op. at 3673) that confidential knowledge should not be imputed to "summer associates" and young attorneys who just join a firm, it should be recalled that Mr. Schreiber fits into neither category -- he was given significant responsibility commensurate with his litigation experience. While a different situation might be present if Mr. Schreiber had been a trusts and estates attorney with no access or occasion to learn Chrysler dealer matters, he as a litigation associate had, in fact, more opportunity to learn Chrysler confidences regarding dealer cases than did many Kelley Drye partners.

and destroys the distinction between attorneys, like Schreiber and Isacson, who had direct access to client confidences, and those who, like Malkan, had no access to such confidences except by a later association with a Schreiber or an Isacson. All are now allowed to rebut the "inference" and, consequently, in order to disqualify a Schreiber or an Isacson, the former client must prove the exact confidences which the attorney could utilize.

Under the law existing when the motion for disqualification herein was made, Chrysler was not required to (and therefore did not) detail Mr. Schreiber's activities or the extent of his participation in each dealer case, or to demonstrate that during the course of any single dealer case Mr. Schreiber would have necessarily learned a specific, relevant confidence, or that he learned specific confidences. Much of this information was non-public and confidential. Indeed, while the panel's opinion suggests that Chrysler spoke in "largely conclusory terms" (slip. op. at 3680), all that this Circuit's cases ever required was a showing of access to relevant confidential information without detailing the specific confidences or files obtained. As Chief Judge Kaufman held in Emle Indus. Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973), it would be improper to compel the client "to describe in detail the confidential information previously disclosed and now sought to be preserved." The burden of proof the panel has now imposed

on a former client is thus self-defeating; it is also wholly unrealistic for no client could detail each confidence revealed to the former attorney.

B. Compliance With The Canons Should Not Be Left To The District Court's Discretion, Especially When That Court Made Critical Errors of Law

The panel's opinion, relying on Hull v. Celanese Corp., slip. op. 2539 (2d Cir. Mar. 26, 1975), stated that the disposition of a disqualification motion is committed to the District Court's discretion and that only an abuse of this discretion would warrant reversal. At the very least, this discretionary approach conflicts with this Court's prior en banc decision upholding the appealability of Judge Weinstein's order. Prompt review by appeal as of right was sanctioned because of this Court's recognition that a decision in favor of the challenged attorney "has grave consequences to the losing party" and the possibility of error would undermine public confidence in the bar. (496 F.2d at 805). Indeed, none of the principal disqualification cases in this Circuit, Laskey, Fisher Studios, Consolidated Theatres, Inc. v. Warner Bros. Circuit Man. Corp., 216 F.2d 920 (2d Cir. 1954), Emle, supra, G. M. v. City of New York, 501 F.2d 639 (2d Cir. 1974) nor Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), has even hinted that enforcing Canon 4 was "discretionary".

The concept of appellate review restricted only to a showing of abuse of discretion -- which implies that mere error will not warrant reversal -- is totally inconsistent with the need, recognized by Chief Judge Kaufman, to enforce a "strict prophylactic rule to prevent any possibility, however slight, that confidential information... may subsequently be used...." Emle, 478 F.2d at 571.* Consistent with that approach is this Court's statement in Hull that "any doubt is to be resolved in favor of disqualification" (slip. op. at 2544), and the statement of the Ninth Circuit that the right of the challenged attorney "freely to practice his profession must, in the public interest, give way in cases of doubt." Chuguch Elec. Ass'n v. U.S. District Court, 370 F.2d 441, 444 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967).

Upholding the District Court's decision on the theory of discretion is particularly anolomous here since this Court's opinion clearly rejected the two misconceptions which were the cornerstones of the lower court's opinion -- that the standard of ethics for associates is inherently less stringent than that applied to partners (compare slip. op. at 3679 with 370 F. Supp. at 587) and that amorphous antitrust considerations may release

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* The panel's opinion suggests that disqualification would only be warranted where there was a "realistic chance that confidences were disclosed...." (slip. op. at 3680).

associates from the duties imposed upon them by the Canons (compare slip. op. at 3681 n.9 with 370 F. Supp. at 591). On the basis of these erroneous principles, the District Court fashioned an unprecedented, varying burden of proof which it retroactively held Chrysler had not satisfied. (370 F. Supp. at 587). It is simply incomprehensible how the District Court's findings and conclusions -- which were the products of this improper burden of proof -- could be upheld on the grounds that there was no showing of an abuse of discretion.*

In short, Chrysler respectfully submits that the panel's opinion, without the benefit of an en banc hearing, has completely overturned the principles governing disqualification previously established by this Court. Clients can no longer be confident that their disclosures will be protected, as lawyers who had direct access to their confidences now are permitted to "rebut" a permissive inference that always was a conclusive presumption.

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* The notion that the District Court's decision is shielded from appellate scrutiny by an undefined discretion is all the more baffling as that Court did not hold a hearing and its findings and conclusions are therefore not protected by the "clearly erroneous" rule (Fed. R. Civ. P. 52(a)). Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 879 (2d Cir. 1972); Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950). In the absence of a hearing below, the appellate court should not, as a matter of course, adopt the lower court's findings.

POINT II

THE BLATANT APPEARANCE OF IMPROPRIETY CREATED BY PLAINTIFF'S COUNSEL'S PARTICIPATION IN THIS LITIGATION WARRANTS DISQUALIFICATION ACCORDING TO PRECEDENT

While the facts clearly demonstrate that disqualification for breach of Canon 4 is warranted, Chrysler also submits that the appearance of impropriety is so striking that Mr. Schreiber and his firm must be disqualified under Canon 9, which provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety". Although, the panel majority's opinion suggests that Chrysler cannot expect to disqualify all former Kelley Drye associates, it should be noted that Mr. Schreiber was not just an attorney who was peripherally involved with Chrysler. He, during his approximate 3 year association with Chrysler's "Counsel", spent well over 1000 hours on Chrysler matters; as a member of the litigation department, he in fact dealt directly with Chrysler personnel and worked on Chrysler dealer cases. Despite this background he has now switched sides, joined with Mr. Hammond, a self-acknowledged specialist in dealer litigation, a past and present adversary of Chrysler's, and commenced a dealer suit of the very same variety as were being handled in the Kelley Drye litigation department and on which he worked. Neither the public nor the client can be expected to understand that Mr. Schreiber should now be permitted to prosecute this litigation.

It is respectfully submitted that the panel (slip op. at 3676-77) has misconstrued Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972), Chuguch Elec. Ass'n v. U.S. District Court, supra; and Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973). In each of those cases the court found no substantial relationship between the former and present representation and no violation of Canon 4, but nonetheless disqualified the attorney because of an appearance of impropriety. Thus, in Richardson the Third Circuit concluded that the "exact nature of the information" received from the former client was not known but the attorney was nonetheless not permitted "to place himself in a position where...it appears to the public and his former clients that he might be tempted," to misuse confidences (469 F.2d at 1385). Similarly in Motor Mart, the District Court said that it had found no breach of Canon 4, but nonetheless disqualified the attorney, saying:

> "Even if his relationship with Saab Motors was relatively small and even if the prior action did not raise issues identical to those involved herein, his past activities raise a shadow over his present involvement. Emle Industries, supra, requires this Court to remove that shadow by disqualifying counsel." 359 F. Supp. at 158.

And the Standing Committee on Professional Ethics of The American Bar Association has stated:

> "It is also true that it is not what the lawyer may have learned in the previous lawyer-client relationship but what others, the bar and the public, may have thought

was learned that prevents assuming a new lawyer-client relationship with a former opponent." Informal Decision No. C-493 (Nov. 22, 1961).

In short, disqualification must be ordered even in the absence of a Canon 4 violation when a contrary ruling would lead the former client and the public to believe that the attorney has escaped disqualification "on a technicality". E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 395 (S.D. Tex. 1969). As this Court recently stated: "The subtleties of differential proof will not obviate the 'appearance of impropriety' to an unsophisticated public." G.M. v. City of New York, supra, 501 F.2d at 651. It follows that disqualification must be ordered in this case regardless of whether or not an actual violation of Canon 4 is found. There is not such a shortage of counsel in this metropolis, nor are the areas of legal practice so limited, that an attorney must be allowed specialize in suits against the clients he once represented.

CONCLUSION

It is respectfully submitted that the District Court's order should be reversed, with costs, and that the other relief requested in Chrysler's briefs on appeal be granted.

Dated: New York, New York
June 6, 1975

Respectfully submitted,

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